In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1408

LOUIS R. JONES and BILLY DON THOMPSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In January 1968, in the United States District Court for the Western District of Arkansas, petitioners entered pleas of guilty to a two-count information charging them with entering a federally insured bank with the intent to commit a larceny and with the commission of a larceny in violation of 18 U.S.C. 2113(a) and (b), respectively. They also entered guilty pleas to several other indictments

(which had been transferred under Rule 20, F. R. Crim. P.) charging offenses unrelated to the bank-robbery charges.[1] At the time, petitioner Jones was represented by retained counsel and petitioner Thompson was represented by assigned counsel (Tr. 31, 46). On January 26, 1968, petitioner Jones was sentenced to twenty years' imprisonment on the bank-larceny charge and received five-year concurrent sentences on each of the three other removed charges to which he had entered guilty pleas. Petitioner Thompson was also sentenced to twenty years on the bank offense and to five-year concurrent terms on the two other charges against him. Both were made eligible for parole at such time as the board of parole might determine, pursuant to 18 U.S.C. 4208(a)(2) (Tr. 39, 44-45, 49).

The present proceeding arises from an application for relief under 28 U.S.C. 2255, filed in the sentencing court.[2] That court denied the motion with-

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[1] These indictments charged as follows: (1) both men were charged in Texas with transportation of a stolen car in interstate commerce in violation of 18 U.S.C. 2312; (2) Jones was charged in Missouri with uttering a forged postal money order (18 U.S.C. 500); and (3) both men were charged in Louisiana with forcible entry into a U. S. Post Office with intent to commit larceny in violation of 18 U.S.C. 2115.

[2] A number of motions attacking the sentences were made by the petitioners in the district court. On February 2, 1968, petitioner Thompson sought to withdraw his plea of guilty to the information (Pet. 3). He was present when the cause was heard and denied. Petitioner Jones filed a Section 2255 motion on June 6, 1968 which was denied after a hearing. Jones was not present at that hearing. We have caused transcripts of both hearings to be lodged in this Court. On

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out a hearing on finding the files and records conclusively established petitioners were not entitled to relief. The court of appeals affirmed in a comprehensive opinion thoroughly canvassing and rejecting the issues which petitioners reassert in the present petition (Pet. App.). While we rely here in the main on the opinion of the court of appeals, we deem it appropriate to substantiate further the correctness of the rulings below by describing more precisely for this Court what took place at the time petitioners were arraigned.

1. There was nothing said (directly or indirectly) by the district court at arraignment which could have led petitioners to believe, as they now claim, that having waived indictment they had to plead guilty to the information.

At the arraignment the court read the two counts of the information (Pet. App. D) to petitioners, advised them they had a right to remain mute, they could consult with counsel and any statement they made could be used against them. Petitioners also were told they had a right to have the matter presented to the grand jury convening on January 30, 1968 (Tr. 3-5). At the same time, the court explained to petitioners they could waive grand jury

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January 6, 1969, the petitioners filed a 2255 motion in the district court which was denied by the court in separate orders (see the District Court Record—"D.R." 4, 5). Following the denial, the petitioners sought a rehearing by another judge (D.R. 6, 7). Both the petition and the motion to disqualify were denied as being without merit (D.R. 11). The present proceedings stem from these latter orders.

presentment and let the matter be presented to the court upon the two-count information which had been read to them (Tr. 5). They were told waiver of the grand jury presentment had to be in writing.

The court asked each defense attorney if his client understood the meaning of the waiver of presentment and could intelligently execute such a waiver. Each defense counsel replied he had discussed the matter with his client and, in each case, his client had preferred to waive presentment and be proceeded against by information. The petitioners then signed waivers (Tr. 5-8). The court "to be sure there was no mistake about it" reread the information (Tr. 9). Jones (Tr. 11-12) and Thompson (Tr. 13) then plead guilty to each count. The court questioned both regarding any inducement, including leniency or threats; both responded there was no inducement and stated they were pleading purely and simply because they were guilty (Tr. 12-14). The judge then asked each defense attorney if his client understood the nature of the charge and comprehended the effect of a plea of guilty. Counsel replied affirmatively (Tr. 14-15).

As the court of appeals pointed out, petitioners were represented by adequate counsel, were fully aware of the alternatives open to them and freely and voluntarily chose to enter guilty pleas. The fact the court at arraignment mistook the permissible maximum penalty for bank robbery did not render the pleas involuntary (Tr. 5, 11).[3] Since defense

[3] The court was of the erroneous view that he could impose consecutive sentences. 18 U.S.C. 2113(a) and (b). See *Prince* v. *United States*, 352 U.S. 322.

counsel immediately advised the court it was in error in this regard (see Tr. 15),[4] "it is evident the petitioners were aware of the correct maximum sentences" (Pet. App. B 6) and were not misled by the trial judge's initial error, which was corrected at sentencing (see Tr. 39, 45, 49). There was, in short, full compliance with Rule 11, F.R. Crim.P., and the pleas were voluntarily and knowingly entered with the assistance of able counsel. See *Brady* v. *United States*, No. 270, this Term, *Parker* v. *North Carolina*, No. 268, this Term, *McMann* v. *Richardson*, No. 153, this Term, each decided May 4, 1970.

2. The claim by petitioners that their constitutional rights were violated due to a failure of the judge (in the Rule 20 proceeding) to advise them affirmatively they had a right to plead "not guilty" is, as the court below correctly pointed out, a frivolous and shallow contention, totally without merit (Pet. App. B 4-5). A defendant who consents, under Rule 20(a), F.R.Crim.P., to a transfer of indictments pending against him in districts other than the district in which he is arrested indicates by his very consent an intention to plead guilty or *nolo contendre*

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[4] The United States Attorney's Office for the Western District of Arkansas informs us that counsel for Thompson submitted a memorandum to the court concerning sentencing on January 25, 1968, the day prior to the sentencing herein. Counsel referred the sentencing judge to an Eighth Circuit opinion discussing *Prince* v. *United States*, *supra*, which deals with sentencing upon multiple convictions under 18 U.S.C. 2113, the bank robbery statute. *Kitts* v. *United States*, 243 F. 2d 883 (C.A. 8).

to the charges in those indictments.[6] Accordingly, the proper court inquiry in a Rule 20 proceeding is whether the defendant did in fact knowingly and voluntarily give his consent to the transfer initially and whether he now wishes to stand by that consent. Such inquiry was made in this case.

The court asked each petitioner if, of his own free will, he had requested that other charges pending against him be transferred to the Western District of Arkansas (Tr. 18-19, 22-23, 34-35). Counsel for each petitioner was asked if his client understood the nature and gravity of each such charge and realized he would have an opportunity under Rule 20 to plead to the indictment (Tr. 18-19, 23-24). Both men were advised by the court during consideration of the first indictment so transferred that they did not have to make a statement—"you can stand mute if you want to * * *"—and anything they said could be used against them (Tr. 19). Each indictment was then read aloud and the maximum penalty described (Tr. 19-20, 22-25, 31-33). Again the court sought assurances that no improper inducement motivated the pleas (Tr. 21-22, 26, 35-36). Only then did the petitioners enter pleas of guilty to each indictment in which they were charged (Tr. 20-21, 25, 35-36).

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[6] Rule 20(a), F.R.Crim.P., provides in pertinent part: A defendant arrested * * * in a district other than that in which the indictment * * * is pending against him may state in writing that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment * * * is pending and to consent to disposition of the case in the district in which he was arrested * * *, subject to the approval of the United States attorney for each district. * * *

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Certainly, the procedures followed provided ample assurance that the guilty pleas were entered knowingly and voluntarily.[6]

For the foregoing reasons, and for the reasons stated by the court below, it is respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

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[6] Petitioners' remaining contention (Pet. 16-20) as to the unconstitutionality of the bank robbery statute because it makes a federal offense of "any larceny" (18 U.S.C. 2113(a)) is fully answered in the opinion below, on which we rely here (Pet. App. B 3-4).

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